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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AMVETS, DEPARTMENT OF  
CALIFORNIA,

Plaintiff and Respondent,

v.

JOEL C. DEVENISH, et al.,

Defendants and Appellants.

G042350

(Super. Ct. No. 30-2008-00108297)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey  
T. Glass, Judge. Affirmed.

Stephen W. Johnson for Defendants and Appellants.

Grant, Genovese & Baratta, David C. Grant and Ronald V. Larson for  
Plaintiff and Respondent.

Defendants Joel C. Devenish, Joseph T. Kolano, Donald G. McDonald, Joaquin N. Silva, and Manuel Toledo appeal from the judgment entered after the trial court summarily adjudicated or dismissed all issues in plaintiff AMVETS, Department of California's claim for declaratory relief and plaintiff dismissed without prejudice the remaining causes of action. Defendants contend the court erred in finding they violated the Corporations Code in amending their Constitution because as the Board of Directors they had the authority to make that amendment without plaintiff's consent. We disagree and affirm the judgment.

## FACTS AND PROCEDURAL BACKGROUND

Plaintiff is the California "department" of AMVETS, a national veteran's charitable organization and "a federally chartered membership corporation created by an act of Congress." Incorporated in 1946, plaintiff has 52 chartered posts and approximately 9,300 members consisting of persons who served in the armed forces after September 1940.

AMVETS's National Constitution permits "each state department to authorize and create a subordinate organization known as the AMVETS Department of (*state*) Service Foundation." (AMVETS National Const. (2007) art. XVII, § 2.) Accordingly, plaintiff's bylaws provide: "The Department of California AMVETS hereby creates the AMVETS, Department of California Service Foundation" (Foundation). (AMVETS Dept. of Cal. By-laws (2007) art. XXI, § 1.)

The Foundation was incorporated in 1949 as a nonprofit corporation and is registered with the Attorney General's office as a charitable trust. A Certificate of Amendment of Articles of Incorporation was filed in 1970. The Foundation's purposes are to raise money and act as trustee, supervising the income, expenditures, investment and reinvestment of such funds to support services for veterans.

Prior to May 2008, the Foundation's Constitution provided that "[t]he six (6) members of the Board of Trustees shall be elected by and from among [plaintiff's] members . . . at the State Convention." (AMVETS Cal. Service Foundation Const. & By-Laws (1997) art. IV, § 1.) It also gave the Foundation's "[c]ommander" the right to fill vacancies on the board. (*Id.*, art. IV, § 4.)

But in May 2008, defendants, the Foundation's then-incumbent board members, unilaterally voted to amend the Foundation's Constitution. Among other things, they rewrote four provisions of the 1997 version to give the board the sole right to elect its members (AMVETS Cal. Service Foundation Const. & By-Laws (2008) art. IV, § 1), fill vacancies on the board (*id.*, art. IV, § 4), adopt policies and procedures according to its own Articles of Incorporation (*id.*, art. VIII, § 1), and amend the Foundation's Constitution (*id.*, art. IX).

After the amendment, defendant Toledo wrote to James Pidgeon, the Foundation's then-commander, informing him, "By the new Constitution and By-Laws of the . . . Foundation, we no longer elect Board of Trustees at the State Convention. I suggest please take off the Foundation [sic] on your agenda." When Pidgeon was elected to serve on the Foundation's board at plaintiff's convention the following month, defendants refused to acknowledge the results.

Plaintiff sued defendants and the Foundation for declaratory relief, injunctive relief, breach of fiduciary duties, and accounting. It dismissed the Foundation as a defendant a few months later.

Subsequently, plaintiff moved for summary adjudication of the following issues in the declaratory relief claim: (1) the Foundation was subordinate to plaintiff, its parent corporation; (2) defendants' amendments of the Foundation's Constitution and by-laws were unlawful and void; (3) plaintiff's members have the right to elect members of the Foundation's Board of Trustees; and (4) plaintiff's commander has the right to fill vacancies on that board. The motion was premised on the grounds the May 2008

amendments were void because they failed to comply with the Corporations Code (all further statutory references are to this code unless otherwise indicated) and the Foundation's and AMVETS's by-laws and constitutions.

Although the court found a triable issue of material fact as to the latter, it granted the motion on statutory grounds. It found, as to the first issue, that "[F]oundation is a subsidiary of the [p]laintiff, as that term is used in . . . [section 5073]." Regarding the second issue, it determined that the 2008 amendments to the Foundation's Constitution were void, reasoning that "since [p]laintiff's members have had voting rights, they are 'members' of the Foundation" under section 5056, subdivision (a). Additionally, "at least some of . . . [p]laintiff's members were members of the Foundation []because they attended the state convention[]." As members, they were "entitled to elect Board members" and "[t]heir voting rights could not be terminated without compliance with . . . [section] 5342," which "requires 45 days[]" notice of proposed changes to members and that the members vote on the changes." "Since that was not done, [s]ummary [a]djudication is appropriate."

On the third issue, the court ruled the Foundation's Constitution reserved "the right to elect board members . . . to the members present at the convention . . . . If it so happens that members of [p]laintiff attend the convention, they would all have the right to vote. [But] . . . no member of [plaintiff] not at the convention can vote." Finally, as to the fourth issue, it determined that because "the 2008 amendments were void, the command[er] of [plaintiff] retained his right to fill vacancies."

All other issues in the declaratory relief cause of action and the remaining causes of action were dismissed. The trial court entered judgment in plaintiff's favor.

## DISCUSSION

A trial court properly grants a motion for summary adjudication if there are no issues of triable fact and the moving party is entitled to judgment as a matter of law on a particular cause of action, defense, claim, or issue of duty. (Code Civ. Proc., § 437c, subds. (c) & (f).) We review a ruling on summary adjudication de novo, “liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. [Citation.]” (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

Defendants do not assert a triable issue of material fact exists but rather argue summary adjudication was inappropriate because sections 5056, 5073, and 5342, which were enacted in 1978 and became operative after 1980, could not “be retroactively applied so as to alter [the] pre-existing rights” “of the Board of Directors . . . [, which] have been in place since [the Foundation’s] inception in 1949.” The contention lacks merit.

Contrary to defendants’ claim, section 9910 does not “[m]ake[] application of the above . . . laws effective [only] to corporations incorporated after 1/1/80,” but rather sets forth definitions “used in [s]ections 9910 to 9927 . . . .” (§ 9910.) And, although section 9911, subdivision (a) states that “[t]he new public benefit corporation law applies to all corporations which are incorporated on or after January 1, 1980,” it does not preclude its application to corporations incorporated before that date. In fact, section 9912, subdivision (a) specifically provides that “[e]ach corporation which is subject (pursuant to the terms of the prior nonprofit law or some other specific statutory provision) to the prior nonprofit law *shall, on and after January 1, 1980, be subject to the new public benefit corporation law . . . .*” (Italics added.) This includes a corporation the “assets of which are irrevocably dedicated to charitable or public purposes and which

according to its articles or bylaws must upon dissolution distribute its assets to a person or persons carrying on a similar purpose or purposes . . . .” (§ 9912, subd. (a)(4).)

Here, in its 1970 amendment to its articles of incorporation, the Foundation irrevocably dedicates its assets to AMVETS, if still in existence, or “if not then in existence to another organization which is organized and operated exclusively for the welfare and aid to” veterans of the armed services. The trial court thus did not err in applying the current public benefit law.

Defendants also contend the court’s finding “that only those who show up as delegates are members . . . necessarily means that members only come into existence when they appear at the convention” and they “could not know who the members are in advance and that notice is impossib[le].” We are not persuaded.

Under plaintiff’s by-laws, the state convention is held annually between May and June 30. Each chartered post, of which there are currently 52, is entitled to send to the convention two delegates and two alternates, who are to be elected “at a regularly scheduled or special post meeting” (AMVETS Dept. of Cal. By-Laws (2007) art. IV, § 2(b)) and “may pre-register [for the convention] with [plaintiff’s] Headquarters . . .” (*id.*, art. IV, § 2(d)). Defendants have not explained why it would be impossible to obtain the names of the delegates following the post meeting or from the plaintiff’s headquarters prior to their attendance at the convention.

Defendants maintain it is unclear what the court meant when it determined “[p]laintiff’s members were members of the Foundation (because they attended the state constitution) [*sic*] [and t]heir voting rights could not be terminated without compliance with . . . [section] 5342.” They argue this is illogical because they as trustees “would be the members the [c]ourt is talking about, and their rights were not terminated.” Presumably this is based on their assertion they were the Foundation’s only members as set forth in the 1970 amendment to its articles of incorporation and its Constitution. According to defendants, both of these “pre-date[] . . . [sections] 3510 and 3056” and

“cannot alter . . . rights in effect at the time of their enactment.” We have already rejected this claim and defendants’ failure to offer further argument forfeits the issue. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Defendants have not challenged the court’s ruling on the fourth issue that “the command[er] of [plaintiff] retained his right to fill vacancies.” Although the standard of review is de novo, the scope of that “review is limited to issues that have been adequately raised and briefed. [Citation.]” (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 973, fn. 3.) We thus have no occasion to address this issue.

In their reply brief, defendants argue that “even if the new public benefits corporation laws were effective and applicable to [them]” (capitalization and bold omitted), the Foundation was a “no-member” corporation under section 5310, subdivisions (b) and (c) because “the only designated members are the Board,” whose majority vote “is all that is required to act.” “[W]e need not consider new issues raised for the first time in a reply brief in the absence of good cause, and [defendants have] not shown any. [Citation.]” (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214.) The contention lacks merit in any event because defendants conceded in their responses to requests for admissions that plaintiff’s members had voting rights prior to May 2008 and under section 5056, subdivision (a), a “[m]ember” means any person who, pursuant to a specific provision of a corporation’s articles or bylaws, has the right to vote for the election of a director or directors . . . .” As the trial court found, that definition includes plaintiff’s members.

## DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.